JKP Sdn Bhd v PPH Development (M) Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NO P–02–1030 OF 2004 AND P–02–1148 OF 2004
DENIS ONG, TENGKU BAHARUDIN SHAH AND JAMES FOONG JJCA
9 FEBRUARY 2007

Contract — Estoppel — Representation — Whether representation to pay on behalf of third party for work done was made by appellant to respondent — Consideration of contemporaneous documents showed high probability that appellant did make representation to respondent — Whether appellant bound by representation

Contract — Building contract — Claim for payment for work done under sub-contract — Interim certificates issued by project architect after progress payment claims were submitted — Failure of defence to plead that quality of work and materials supplied as mentioned in interim certificates were unsatisfactory — Whether defendant could question architect on the works at trial

The Urban Development Authority was corporatised as UDA Holdings Sdn Bhd in 1995. Several of its development projects were facing implementation problems. Taman Sri Bayu ('the project') in Bayan Lepas, Penang, was one of them. Phase 1 of the project, consisting of 730 low and medium cost flats and houses, were sold to various purchasers but around 1998 these flats and houses were only 15% completed. To rehabilitate the project, the Government of Malaysia, through the appellant which was a wholly owned company of the Minister of Finance Incorporated, took over the task of completing the project. The approach of the appellant was to allocate the project to the first defendant under a privatization agreement with a condition that this project was to be completed within a specified time. After entering into this agreement with the appellant on 26 May 1988, the first defendant appointed the respondent as the main contractor to complete Phase 1 of the project. This appointment of the respondent was later formalized by a building agreement ('the building agreement') signed between the first defendant and the respondent. Under the terms and conditions of the building agreement, the respondent was to be paid by the first defendant within 30 days from date of presentation of the interim architect's certificate ('interim certificate') by the respondent to the first defendant for work carried out in Phase 1 of the project. But right from the start, the first defendant was unable to fulfill this obligation to pay the respondent. The first defendant had to resort to borrowing money from the appellant to pay the respondent. The first was for a sum of RM1,606,115.44. This was followed by a sum of RM2m given on 19 May 2000. The third was a sum of RM1,940,169.20 given on 4 October 2000. All these loans were released by the appellant direct to the respondent. By 21 December 2000, when Phase 1 of the project was substantially completed, the first defendant once again experienced financial difficulties. Interim Certificates

bearing No 20 to 23 amounting to RM1,738,648.45 were not settled by the first defendant to the respondent. Though the respondent could have terminated the building agreement for reason that the first defendant had breached a term in this contract, the first defendant did not resort to such action. Instead, it continued to provide materials and services to Phase 1 of the project. According to the respondent, this was due to a representation ('the representation') made by the appellant's Managing Director, one Zulkefli A Hassan ('SD1'), to his counterpart in the respondent ('SP1'), and the project director of the respondent ('SP2'), that the appellant would pay the respondent and the respondent's sub-contractor for all work and materials supplied to Phase 1 of the project.

By the beginning of 2001, work on Phase 1 of the project was 90% completed. The outstanding amount due under Interim Certificates No 20 to 25 as well as the respondent's progress claim No 26 amounted to RM5,433,913.49. When this was not paid by either by the first defendant or the appellant, the respondent stopped work. The first defendant retaliated with a termination notice to the respondent for failing 'diligently to complete the works'. Refusing to accept this, the respondent challenged this notice by asserting wrongful termination and insisting that work would only recommence if the respondent was paid. When the matter could not be resolved, the first defendant attempted to recover the work site from the respondent. During this period, certain building materials on site went missing. Eventually the site was recovered by the first defendant from the respondent. As a result of this discord, the first defendant's privatization agreement was terminated by the appellant. Then, the appellant itself was replaced by yet another government body known as Syarikat Perumahan Negara to complete Phase 1 of the project. For this tussle, the respondent brought this action against the first defendant and the appellant claiming inter alia: (1) a declaration that the first defendant's termination was wrongful, invalid and of no effect whatsoever; (2) the first defendant and the appellant do pay the respondent a sum of RM5,433,913.49 due under Interim Certificates No 20 to 25 and respondent's progress claim No 26; (3) a sum of RM1,556,198.12 being interest at the rate of 8% per annum on the sum of RM3,970,936.44 due under Interim Certificates No 20 to 25 as at 30 November 2003 and further interest of 8% per annum on the same amount from 1 December 2004 till date of realization; (4) an order that an account be taken of the value of all works duly executed by the respondent and payment of any sum found due together with interest of 8% per annum thereon; and (5) retention sum of RM1,446,980.23 together with interest at the rate of 8% per annum from such date to be determined by the court until full realization.

Summary judgment for a sum of RM3,127,995.35 with interest thereon was obtained by the respondent against the first defendant on 8 January 2003. At the time of the trial, the first defendant did not appear. Thus when the trial proceeded, it was a contest between the respondent and the appellant. In its defence, the appellant maintained that it had nothing to do with the respondent. It did not appoint the respondent as the contractor for Phase 1 of the project nor did the appellant make the representation as claimed by the respondent. Though admitting that it had made direct payments to the respondent on the three previous occasions as disclosed, the appellant explained that these were done for and on behalf of the first defendant who was experiencing cash flow problems at the material time and required loans from the appellant to tie them over this difficult period.

As for the comfort letters, they were never sent to the respondent. They were only forwarded to the respondent's sub-contractors and suppliers. These were intended to encourage them to lend support to the first defendant to complete Phase 1 of the project. According to the appellant, these letters were never intended to imply that the appellant would make payment direct to the respondent who would then disburse it to its sub-contractors and suppliers.

With regards to the supplementary agreement entered into between the first defendant and the appellant, the appellant pointed out that the respondent was not privy to this contract. It was strictly an arrangement between the first defendant and the appellant. In any event, none of the terms stated in the supplementary agreement stipulated that the appellant had undertaken to pay the respondent for what was due and owing by the first defendant.

At the conclusion of the trial, the trial judge gave judgment for the respondent. The appellant appealed on both liability and quantum. Regarding liability, the appellant disputed that the representation was made to the respondent. On the appeal over quantum awarded, the appellant was basically dissatisfied with the trial judge's: (1) refusal to allow the appellant to cross-examine the architect who issued the Interim Certificates No 20 to 25, thereby depriving the appellant of an opportunity to challenge the works of the respondent stated therein; (2) failure to set off an amount for building materials removed from the site before the first defendant regained possession of it; and (3) award of pre-judgment interest to the respondent. According to the appellant, the High Court had awarded pre-judgment interest from the date of the supplementary agreement, namely 2 January 2001 when the building contract did not provide for any late payment interest. The learned judge had therefore, it was argued, erred in law and/or in fact in finding in effect that the date of the purported representation by the appellant to the respondent was the date of the supplementary agreement when the respondent was not a party to this contract.

Held, dismissing the appeal and allowing the cross appeal in part:

(1) The approach of the Court of Appeal when faced with two conflicting versions where the issue was the credibility of witnesses about what was said or not said, or done or not done, as was the case here, is to give great weight to the view formed by the primary trier of fact and not to differ therefrom save in exceptional circumstances; *Hong Chuan Lay v Dr Eddie Soo Fook Mun* [2006] 2 MLJ 218 followed (see para 18).

(2) After perusing the evidence, the trial judge had not only applied the right test but had also supported his decision with cogent evidence. At the material time when the representation was allegedly made, the appellant was well aware that a substantial sum was due and owing by the first defendant to the respondent and the first defendant had no means at the material time to satisfy this. Apart from this, the appellant also knew that if this was not paid, the respondent would stop work. The appellant, being the owner of the project, could not risk this since Phase 1 of the project had to be completed urgently in order to pacify the disgruntled house buyers. Under such pressing circumstances, and with a track record for bailing out the first defendant financially with direct payments to the respondent, the trial judge's finding was correct that it was very probable

that the appellant did make the representation to the respondent. This conclusion was further supported by the comfort letters and the supplementary agreement (see paras 19–20).

(3) By themselves, the comfort letters did not contain the representation nor did their contents bind the appellant to any contractual promise to pay the respondent for the outstanding debts. But by being contemporaneous documents, they inferred that the representation was made by the appellant to the respondent (see para 21).

(4) The other document which carried more weight was the supplementary agreement. Again this document should not be taken in isolation. Since the respondent was not a party in this agreement, the respondent was not privy to the terms and conditions therein. But this was not the issue. The focus on this document was that it contained provisions to pay the debts of the first defendant direct to the respondent. This was exactly what the respondent claimed that the appellant represented to them. When there existed such similar undertakings, especially made in a self declaratory statement in a formal document to a party who was very much involved in the matter, then it strongly implied that the representation was made (see para 22).

(5) There was also, as the trial judge found, the correspondence from the respondent to the appellant where the respondent complained that the appellant had not acted on its promise to pay. This court agreed once again that though this letter was sent after the appellant had refused to pay the respondent but, being a contemporaneous document, it strongly added support to the existence of the representation (see para 23).

(6) There was no dispute that after the representation was made, the respondent acted on the inducement contained in the representation, firstly, by not terminating the building agreement, which it could have done, and secondly, by continuing with further construction on Phase 1. The respondent would not have forgone and undertaken these acts if not for the representation made by the appellant (see para 25).

(7) The interim certificates were issued by the project architect after progress payment claims were submitted by the respondent to the first defendant. Before these certificates were issued, the architect must have verified the respondent's claim. Despite this, the appellant wished to question the architect on the works mentioned in these documents. This court agreed with the trial judge that this should be refused. This was because the defence did not plead that the quality of work and materials supplied as mentioned in interim certificates were unsatisfactory. Whilst an interim certificate is not conclusive and binding on the employer as an expression of satisfaction with the quality of work and materials supplied nevertheless, if the employer desires to challenge this, then it is imperative for him to say so in his defence, otherwise he is deemed to have conceded to the quality and materials stated therein. Not only must this be pleaded, the employer must also advance reasonable amount of particulars, in detail, as to why the amount stated in such document is disputed and ought not be paid;*Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57 followed (see para 29).

(8) To succeed in a claim for building materials found missing from the building site after the first defendant repossessed it from the respondent, one must first identify the missing items and then prove their worth. Here, there was a total absence of the latter. For this, this court would uphold the trial judge's ruling in not awarding any sum to the appellant under this item to set-off against the amount due to the respondent (see para 31).

(9) Regarding the appellant's last ground of appeal on the award of pre-judgment interest by the High Court, no sealed copy of the court order was annexed to the appeal record in respect of this appeal. And what was alleged by the appellant was not even an item allowed by the trial judge in his grounds of judgment. When there was no definite award made on this matter, then no issue could arise out of it. Therefore, this contention of the appellant could not be entertained for reason of uncertainty (see para 35).

(10) The appellant's witnesses had claimed that certain items in the buildings were missing or damaged. This was when they attempted to retake possession of the building site. But there was no request by either the first defendant and/or the appellant to the respondent to make good these missing or damaged items. And neither was there any evidence to quantify the amount spend in replacing and repairing them. In the absence of these, it must be implied that the first defendant and/or the appellant had agreed to forgo such claim to be paid out of the retention sum. For this, the retention sum must be refunded to the respondent. Since the representation was confined to principally payment of Interim Certificates No 20-25 and progress claim No 26, then any refund of the retention sum by the appellant must be restricted to the amount retained under these certificates and claim (see para 39).

[Bahasa Malaysia summary

Perbadanan Pembangunan Bandar telah dikorporatkan sebagai UDA Holdings Sdn Bhd dalam tahun 1995. Beberapa projek pembangunannya menghadapi masalah. Taman Sri Bayu (projek tersebut) di Bayan Lepas, Pulau Pinang adalah salah satu daripadanya. Fasa 1 projek tersebut, mengandungi 730 rumah dan pangsapuri kos murah dan sederhana, yang dijual kepada pelbagai pembeli tetapi sekitar tahun 1998 pangsapuri-pangsapuri dan rumah ini hanya siap 15% sahaja. Bagi memulihkan projek tersebut, Kerajaan Malaysia, melalui perayu yang merupakan sebuah syarikat milik penuh Menteri Kewangan yang diperbadankan, mengambil alih tugas menyiapkan projek tersebut. Pendekatan yang digunakan perayu adalah meletakkan projek tersebut kepada defendan pertama melalui perjanjian penswastaan dengan syarat projek ini hendaklah disiapkan dalam masa yang ditentukan. Selepas memasuki perjanjian ini dengan perayu pada 26 Mei 1988, defendan pertama telah melantik responden sebagai kontraktor utama untuk menyiapkan Fasa 1 projek tersebut. Perlantikkan responden kemudiannya diformalkan dengan perjanjian binaan ('perjanjian binaan tersebut') yang telah ditandatangani antara defendan pertama dan responden. Di bawah terma-terma dan syarat-syarat perjanjian binaan tersebut, responden hendaklah dibayar oleh defendan pertama dalam jangkamasa 30 hari dari tarikh pembentangan sijil arkitek sementara ('sijil sementara') oleh responden kepada defendan pertama untuk kerja yang dijalankan dalam Fasa 1

projek tersebut. Tetapi pada peringkat permulaan pun, defendan pertama telah gagal memenuhi kewajipannya untuk membayar responden. Defendan pertama terpaksa berhutang wang daripada perayu untuk membayar responden. Jumlah yang pertama adalah sebanyak RM1,606,115.44. Ini diikuti oleh jumlah sebanyak RM2j yang diberikan pada 19 Mei 2000. Jumlah yang ketiga sebanyak RM1,940,169.20 diberikan pada 4 Oktober 2000. Kesemua pinjaman-pinjaman telah dikeluarkan oleh perayu secara terus kepada responden. Pada 21 Disember 2000, apabila Fasa 1 projek tersebut telah sebahagian besarnya sudah disiapkan, defendan pertama sekali lagi mengalami masalah kewangan. Sijil Sementara yang mempunyai nombor 20 hingga 23 berjumlah RM1,738,648.45 tidak diselesaikan oleh defendan pertama kepada responden. Walaupun responden boleh menamatkan perjanjian binaan dengan sebab defendan pertama telah melanggar terma kontrak ini, defendan pertama tidak mengambil tindakan yang sedemikian. Sebaliknya, ia diteruskan dengan menyediakan bahan-bahan dan perkhidmatan-perkhidmatan kepada Fasa 1 projek tersebut. Menurut reponden, ia adalah kerana representasi ('representasi') yang telah dibuat oleh Pengarah Urusan perayu, Zulkefli A Hassan ('SD1'), kepada rakat sejawatnya respondent ('SP1'), bahawa perayu akan membayar responden dan kontraktor kecil responden untuk segala kerja dan bahan-bahan yang telah dibekalkan untuk Fasa 1 projek tersebut.

Pada permulaan tahun 2001, kerja ke atas Fasa 1 projek tersebut telah 90% disiapkan. Jumlah tertunggak di bawah Sijil Sementara No 20 sehingga 25 dan juga tuntutan kemajuan responden No 26 berjumlah RM5,433,913.49. Apabila tidak ada bayaran oleh sama ada oleh defendan pertama dan perayu, responden telah menghentikan kerjanya. Defendan pertama membuat tindakan balas melalui penamatan notis kepada responden kerana gagal 'secara tekunnya menyiapkan kerja'. Menolak untuk menerimanya, responden telah mencabar notis ini dengan menegaskan penamatan adalah salah dan mendesak bahawa kerja akan hanya dimulakan semula jika responden dibayar. Bila perkara ini tidak dapat diselesaikan, defendan pertama membuat percubaan untuk mendapatkan tapak kerja daripada responden. Dalam tempoh ini, bahan-bahan binaan tertentu yang terdapat di tapak telah hilang. Akhirnya, defendan pertama berjaya mendapatkan tapak tersebut daripada responden. Ekoran daripada perbalahan ini, perjanjian penswastaan defendan pertama telah ditamatkan oleh perayu. Kemudiannya, perayu sendiri telah digantikan oleh satu lagi badan kerajaan dikenali sebagai Syarikat Perumahan Negara untuk menyiapkan Fasa 1 projek tersebut. Akibat pergelutan ini, responden telah membawa tindakan ini terhadap defendan pertama dan perayu menuntut antara lain: (1) satu perisytiharan bahawa penamatan defendan adalah salah, tidak sah dan tidak ada apa-apa kesan; (2) defendan pertama dan perayu hendaklah membayar kepada responden sejumlah RM5,433,913.49 yang terhutang di bawah Sijil Sementara No 20 sehingga 25 dan tuntutan kemajuan responden No 26; (3) sejumlah RM1,556,198.12 faedah pada kadar 8% setahun atas jumlah RM3,970,936.44 terhutang di bawah Sijil-sijil Sementara No 20 hingga 25 setakat 30 November 2003 dan faedah seterusnya untuk 8% setahun untuk jumlah sama dari 1 Disember 2004 sehingga tarikh penyelesaian sepenuhnya; (4) satu perintah bahawa pertimbangan dibuat berdasarkan nilai kesemua kerja yang telah dilaksanakan oleh responden dan bayaran untuk jumlah yang didapati terhutang berserta dengannya faedah 8%

setahun; dan (5) Pengekalan jumlah sebanyak RM1,446,980.23 bersama-sama faedah pada kadar 8% setahun dari tarikh yang akan ditentukan oleh mahkamah sehingga penyelesaian sepenuhnya.

Penghakiman Terus untuk jumlah RM3,127,995.35 dengan faedah seterusnya telah diperolehi oleh responden terhadap defendan pertama pada 8 Januari 2003. Pada masa perbicaraan, defendan pertama tidak hadir. Apabila perbicaraan diteruskan, terdapat pertelagahan antara responden dan perayu. Dalam pembelaannya, perayu mempertahankan bahawa ia tiada apa-apa yang perlu dilakukan kepada responden. Ia tidak melantik responden sebagai kontraktor untuk Fasa 1 projek tersebut maupun perayu membuat sebarang representasi sebagaimana yang didakwa oleh responden. Walaupun ia mengakui bahawa ia membuat bayaran terus kepada reponden pada tiga keadaan sebagaimana yang didedahkan, perayu menjelaskan bahawa ia dilakukan untuk dan bagi bihak defendan pertama yang mengalami masalah aliran tunai pada masa material dan memerlukan pinjaman-pinjaman daripada perayu untuk membantu mereka pada masa-masa getir itu.

Berkenaan surat pujukan, mereka tidak pernah menghantar kepada responden. Mereka hanya memajukan kepada kontraktor kecil responden dan pembekal. Ia diniatkan untuk menggalakkan mereka memberikan sokongan kepada defendan pertama untuk menyiapkan Fasa 1 projek tersebut. Menurut perayu, surt-surat ini tidak pernah diniatkan untuk menandakan bahawa perayu akan membuat bayaran terus kepada responden yang kemudiannya akan membayarnya kepada kontraktor-kontraktor kecil dan pembekal-pembekal.

Berkenaan perjanjian tambahan yang dimasuki antara defendan pertama dan perayu, perayu menunjukkan bahawa responden bukan pihak dalam kontrak ini. Ia hanyalah pengurusan antara defendan pertama dan perayu. Jika dalam apa-apa keadaan, tiada terma-terma yang dinyatakan dalam perjanjian tambahan memperuntukkan bahawa perayu telah mengakujanji membayar responden untuk apa-apa yang tertunggak dan terhutang kepada defendan pertama.

Semasa membuat kesimpulan perbicaraan, hakim bicara telah memberikan penghakiman untuk responden. Perayu merayu untuk kedua-dua liabiliti dan kuantum. Berkenaan liabiliti, perayu mempertikaikan bahawa terdapat representasi dibuat kepada responden. Untuk rayuan terhadap kuantum yang diawardkan, perayu pada asasnya tidak berpuas hati dengan hakim bicara: (1) keengganan untuk membenarkan perayu memeriksa balas arkitek yang telah mengeluarkan sijil-sijil Sementara No 20 hingga 25, dan dengan itu telah menghalang peluang perayu untuk mencabar kerja-kerja responden sepertimana yang dinyatakan; (2) kegagalan untuk menolak jumlah bahan-bahan binaan yang telah dikeluarkan dari tapak sebelum defendan pertama mendapatkan semula pemilikannya; dan (3) award faedah pra-penghakiman kepada responden. Menurut perayu, Mahkamah Tinggi telah mengawardkan faedah pra-penghakiman daripada tarikh perjanjian tambahan, yang dinamakan pada 2 Januari 2001 bila kontrak binaan tidak menyediakan sebarang faedah lewat bayaran. Hakim yang bijaksana oleh itu, sebagaimana dipertikaikan, telah khilaf dalam perundangan dan/atau fakta dalam mencari kesan bahawa tarikh representasi yang dikatakan oleh perayu kepada responden adalah tarikh perjanjian tambahan bila responden bukanlah pihak kepada kontrak ini.

Diputuskan, menolak rayuan dan membenarkan sebahagian rayuan balas:

(1) Pendekatan Mahkamah Rayuan bila menghadapi dua versi bertentangan berkenaan isu kebolehpercayaan saksi-saksi mengenai apa yang telah diperkatan atau tidak diperkatakan, atau dibuat atau tidak dibuat, sebagaimana kes disini, adalah untuk memberi pertimbangan yang besar kepada pandangan yang telah dibentuk oleh fakta pencuba pertama dan tidak berbeza daripadanya melainkan terdapat keadaan-keadaan yang boleh mengecualikannya; *Hong Chuan Lay v Dr Eddie Soo Fook Mun* [2006] 2 MLJ 218 diikuti (lihat perenggan 18).

(2) Selepas meneliti keterangan, hakim bicara tidak hanya menggunakan ujian yang betul tetapi juga menyokong keputusannya dengan keterangan yang jelas. Pada setiap masa material bila pengataan representasi telah dibuat, perayu adalah dalam keadaan sedar bahawa jumlah yang agak besar adalah tertunggak dan terhutang oleh defendan pertama kepada responden dan defendan pertama tidak berkemampuan pada masa material untuk memenuhinya. Selain daripada ini, perayu juga mengetahui bahawa jika ia tidak dibayar, responden akan memberhentikan kerjanya. Perayu, yang merupakan pemilik projek tersebut, tidak akan membiarkannya memandangkan Fasa 1 projek tersebut hendaklah disiapkan segera bertujuan untuk menenangkan pembeli-pembeli rumah yang telahpun bersungut. Di bawah keadaan-keadaan yang amat menekankan, dan dengan jejak rekod kerana menyelamatkan kewangan defendan pertama dengan bayaran terus kepada responden, penemuan hakim bicara adalah betul bahawa ia adalah mungkin perayu ada membuat representasi kepada responden. Kesimpulan ini kemudiannya disokong oleh surat pujukan dan perjanjian tambahan (lihat perenggan 19–20).

(3) Antara mereka, surat-surat pujukan tidak mengandungi representasi ataupun isi kandungannya mengikat perayu kepada sebarang janji kontraktual untuk membayar responden hutang-hutang yang tertunggak. Tetapi sebagai dokumen-dokumen terkini, mereka membuat kesimpulan bahawa terdapat representasi yang dibuat oleh defendan kepada responden (lihat perenggan 21).

(4) Dokumen lain yang akan membawa pertimbangan besar adalah perjanjian tambahan. Sekali lagi dokumen ini tidak akan diasingkan. Memandangkan responden bukan pihak kepada perjanjian ini, responden tidak tertakluk kepada terma-terma dan syarat-syarat di dalamnya. Tetapi ia bukannya isu. Perhatian terhadap dokumen ini adalah kerana ia mengandungi peruntukkan-peruntukkan untuk membayar hutang-hutang defendan pertama secara terus kepada responden. Ini merupakan apa yang didakwa oleh responden bahawa perayu telah membuat representasi kepada mereka. Bila terdapat kewujudan akujanji-akujanji yang sama, terutamanya kepada mereka yang terlibat dalam sesuatu perkara, ia secara jelas menguatkan bahawa representasi telah dibuat (lihat perenggan 22).

(5) Terdapat juga, seperti yang ditemui oleh hakim bicara, surat-menyurat daripada responden kepada perayu dimana responden mengadu bahawa perayu tidak mengotakan janjinya untuk membuat bayaran. Mahkamah ini bersetuju sekali lagi bahawa walaupun surat ini dihantar setelah perayu enggan

membayar kepada responden tetapi sebagai dokumen yang terkini, ia akan menambah sokongan berkenaan kewujudan representasi (lihat perenggan 23).

(6) Tiada pertikaian bahawa selepas representasi dibuat, responden bertindak atas dorongan yang terkandung dalam representasi, pertama, dengan tidak menamatkan perjanjian binaan, yang mana ia mungkin akan dibuat, dan kedua, meneruskan dengan pembinaan seterusnya pada Fasa 1. Responden tentunya tidak akan meneruskan dan menjalankan perlakuan-perlakuan ini jika tidak kerana representasi yang telah dibuat oleh perayu (lihat perenggan 25).

(7) Sijil-sijil sementara yang dikeluarkan oleh arkitek projek selepas tuntutan bayaran kemajuan dihantar oleh responden kepada defendan pertama. Sebelum sijil-sijil ini dikeluarkan, arkitek hendaklah menentusahkan tuntutan responden. Meskipun ini, perayu berhasrat menyoal arkitek ke atas kerja yang dimaksudkan dalam dokumen-dokumen ini. Mahkamh ini bersetuju dengan hakim bicara bahawa ia harus ditolak. Ini adalah kerana pembelaan tidak memplidkan bahawa kualiti kerja dan bahan-bahan yang telah dibekalkan seperti dinyatakan dalam sijil-sijil sementara adalah tidak memuaskan. Memandangkan sijil sementara tidak kukuh dan mengikat majikan sebagai menunjukkan berpuas hati dengan kualiti kerja dan bahan-bahan yang dibekalkan, walaubagaimanapun, jika majikan berhasrat untuk mencabarnya, ia adalah mustahak untuknya berkata demikian dalam pembelaan, kalau tidak ia akan hanya dilihat sebagai bersetuju dengan kualiti dan bahan-bahan yang telah dinyatakan. Bukan hanya ia perlu diplidkan, majikan juga mesti mengutarakan jumlah buti-butir yang munsabah, secara terperinci, kenapa jumlah yang dinyatakan dalam dokumen telah dipertikaikan dan tidak dibayar, *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57 diikuti (lihat perenggan 29).

(8) Untuk berjaya dalam tuntutan bahan-bahan binaan yang didapati hilang daripada tapak binaan selepas defendan pertama mendapatkan semula daripada responden, seseorang hendaklah mengenalpasti barangan yang hilang dan kemudiannya membuktikan nilainya. Di sini, terdapat kekosongan pada yang kemudian. Untuk ini, mahkamah ini akan mendokong keputusan hakim bicara yang tidak mengawardkan sebarang jumlah kepada perayu dibawah perkara untuk menolak terhadap jumlah terhutang kepada responden (lihat perenggan 31).

(9) Berkenaan dengan alasan terakhir rayuan perayu terhadap award faedah pra-penghakiman oleh Mahkamah Tinggi, tiada salinan termeterai perintah mahkamah yang dilampirkan ke dalam rekod rayuan berkenaan rayuan tersebut. Dan apa yang didakwa oleh perayu adalah bukan bahagian yang dibenarkan oleh hakim bicara dalam alasan penghakimannya. Bila tidak terdapat award pasti yang dibuat dalam perkara ini, tiada isu akan timbul daripadanya. Oleh itu, perdebatan oleh perayu ini tidak akan dilayan atas alasan ketidakpastian (lihat perenggan 35).

(10) Saksi-saksi perayu mendakwa bahawa bahagian-bahagian tertentu dalam binaan telah hilang dan musnah. Ini berlaku bila mereka mencuba untuk mengambil milikan pada tapak binaan. Tetapi tiada permintaan oleh sama ada

defendan pertama dan/atau perayu kepada responden untuk membaiki bahagian-bahagian yang telah hilang dan rosak. Dan tiada keterangan untuk menyatakan jumlah yang dibelanjakan dalam menukar dan menggantikannya. Dengan ketiadaan ini, secara tersiratnya defendan pertama dan/atau perayu telah bersetuju untuk meninggalkan tuntutan yang kena dibayar daripada jumlah yang dikekalkan. Untuk ini, jumlah yang dikekalkan hendaklah dipulangkan kepada responden. Memandangkan representasi hanya terhad kepada bayaran utama Sijil-sijil Sementara No 20–25 dan tuntutan kemajuan No 26, kemudian sebarang kembalian jumlah yang dikekalkan oleh perayu hendaklah dihadkan kepada jumlah yang dikekalkan di bawah sijil-sijil ini dan tuntutan (lihat perenggan 39).]

Notes

For cases on representation, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3121–3122.

For a case on claim for payment for work done under sub-contract, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 2444.

Cases referred to

Dick Bentley Productions Ltd & Anor v Harold Smith (Motors) Ltd [1965] 2 All ER 67 (refd)

Hong Chuan Lay v Dr Eddie Soo Fook Mun [2006] 2 MLJ 218 (folld)

Kleinwort Benson Ltd v Malaysia Mining Corp Bhd [1989] 1 All ER 785 (refd)

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57 (folld)

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229 (refd)

Appeal from: Civil Suit No 22–85 of 2002 (MT-1) (High Court, Pulau Pinang)

Ambiga Sreenevasan (Zarizana Abdul Aziz & Emily Sehu with her) (K Ahmad & Yong) for the appellant.

JA Yeoh (JJ Chan with him) (Shearn Delamore & Co) for the respondent.

James Foong JCA (delivering judgment of the court):

INTRODUCTION

[1] The Urban Development Authority was corporatised as UDA Holdings Sdn Bhd ('UDA') in 1995. It had more that 20 development projects in Penang. Several of these projects were facing implementation problems. Taman Sri Bayu ('the Project') in Bayan Lepas, Penang, was one of them. Phase 1 of the Project, consisting of 730 low and medium cost flats and houses, were sold to various purchasers but around 1998 these flats and houses were only 15% completed. To rehabilitate the Project, the Government of Malaysia, through the appellant which is a wholly owned company of the Minister of Finance Incorporated, took over the task of completing the Project. The approach of the appellant was to allocate the Project to the first defendant in this suit ('first defendant') under a privatization agreement

with a condition that this project was to be completed within a specified time. After entering into this agreement with the appellant on 26 May 1988, the first defendant appointed the respondent as the main contractor to complete phase 1 of the Project. This appointment of the respondent was later formalized by a building agreement ('Building Agreement') signed between the first defendant and the respondent.

[2] Under the terms and conditions of the Building Agreement, the respondent was to be paid by the first defendant within 30 days from date of presentation of the interim architect's certificate ('Interim Certificate') by the respondent to the first defendant for work carried out in phase 1 of the Project. But right from the start, the first defendant was unable to fulfill this obligation to pay the respondent. The first defendant had to resort to borrowing money from the appellant to pay the respondent. The first was for a sum of RM1,606,115.44. This was followed by a sum of RM2m given on 19 May 2000. The third was a sum of RM1,940,169.20 given on 4 October 2000. All these loans were released by the appellant direct to the respondent.

[3] By 21 December 2000, when phase 1 of the Project was substantially completed, the first defendant once again experienced financial difficulties. Interim Certificates bearing nos 20 to 23 amounting to RM1,738,648.45 were not settled by the first defendant to the respondent. Though the respondent could have terminated the Building Agreement for reason that the first defendant had breached a term in this contract, the first defendant did not resort to such action. Instead, it continued to provide materials and services to phase 1 of the Project. According to the respondent, this was due to a representation (the representation) made by the appellant's Managing Director, one Zulkefli A Hassan (SD1), to his counterpart in the respondent, SP1, and the project director of the respondent, SP2, that the appellant would pay the respondent and the respondent's sub-contractor for all work and materials supplied to phase 1 of the Project.

[4] To support the assertion that the representation was made, the respondent highlighted several comfort letters issued by the appellant to the various sub-contractors and suppliers of the respondent involved in phase 1 of the Project. These letters declared 'that JKP Sdn Bhd ('appellant') has agreed, in principle, to be the Project Owner of the above development project … in addition to our current status of being the beneficial land owner … hence while occasionally injecting fresh funds into the project, JKPSB (appellant) together with FDSB (first defendant), is doing our utmost to expedite the progress disbursement from end-financiers … We are confident that the outstanding payment to you could be settled by PPH Development Sdn Bhd (Main Contractor) (respondent) in due course … trust that you will continue to extent the necessary support to PPH Development Sdn Bhd to ensure the successful completion of the project … Once again we assure you that payment for the outstanding amount due to you would be forthcoming'.

[5] In addition to this, the respondent highlighted a supplementary agreement ('Supplementary Agreement') between the first defendant and the appellant. This agreement varies some of the terms in the privatization agreement executed by these parties earlier. One of the terms in this Supplementary Agreement refers to the debt

owing by the first defendant to the appellant and sub-contractors for phase 1 of the Project. This is exposed in the following clauses of this agreement:

Clause 2(c):

As of 31 December 2000, the developer (first defendant) has completed approximately ninety per centum (90%) of Phase 1 of the development. A copy of the Progress Report No 58 and Architect's Certificate in relation thereto is annexed hereto as Schedule 3A.

Clause 2(d):

As at 31 December 2000 the liabilities already incurred and as yet unsettled by the Developer pertaining to Phase 1 of the Development to the Main Contractor are estimated at Ringgit Malaysia Four Million Three Hundred Eight-Eight Thousand Five Hundred Thirty-Seven and Sen Forty-Seven (RM4,388,537.47) only (hereinafter referred to as 'the Liabilities'). Copies of the architect's certificates are annexed hereto in a bundle as Schedule 3B.

Clause 4:

The owner (the appellant) hereby agrees covenants and undertakes with the Developer that:

(a) The owner shall bear the following liabilities as part of cost of and direct expenditure incurred in the development by the owner (hereinafter referred to as 'Direct Expenditure'), which sum shall be taken into account in the calculation of profits derived and generated from the development

  (i) items 1,2,4,5 and 6 of Schedule III of the Privatisation Agreement;

  (ii) a sum not exceeding the aggregate sum of Ringgit Malaysia Four Million (RM4,000,000) only or any further sum as the Owner may at its sole discretion decide by way of partial settlement of the Main Contractor's outstanding and payable progressive claims exclusive of the sum of Ringgit Malaysia Three Million Four Hundred Thousand (RM3,400,000) only already advanced including the sums advanced vide Loan Agreement dated 27 November 1998 (hereinafter referred to as 'the Loan Agreement').

It is hereby agreed that the Developer shall not make any claims or disburse any payment in relation to works completed pursuant to Architect Certificates more particularly described and annexed hereto as Schedule 5 which payment has already been advanced by the owner save and except to facilitate or by way of reimbursement to the owner of such payments.

[6] A can be seen from the above, by the beginning of 2001, work on phase 1 of the Project was 90% completed. The outstanding amount due under Interim Certificates nos 20 to 25 as well as the respondent's progress claim no 26 amounted to RM5,433,913.49. When this was not paid by either by the first defendant or the appellant, the respondent stopped work. The first defendant retaliated with a termination notice to the respondent for failing 'diligently to complete the works'. Refusing to accept this, the respondent challenged this notice by asserting wrongful

termination and insisting that work will only recommence if the respondent is paid. When the matter could not be resolved, the first defendant attempted to recover the work site from the respondent. During this period, certain building materials on site went missing. Eventually the site was recovered by the first defendant from the respondent but not without consequences. As a result of this discord, the first defendant's privatization agreement was terminated by the appellant. Then, the appellant itself was replaced by yet another government body known as Syarikat Perumahan Negara to complete phase 1 of the Project.

[7] For this tussle, the respondent brought this action against the first defendant and the appellant claiming inter alia:

(1) A declaration that the first defendant's termination is 'wrongful, invalid and of no effect whatsoever'.

(2) The first defendant and the appellant do pay the respondent a sum of RM5,433,913.49 due under Interim Certificates nos 20 to 25 and respondent's progress claim no 26.

(3) A sum of RM 1,556,198.12 being interest at the rate of 8% per annum on the sum of RM3,970,936.44 due under Interim Certificates nos 20 to 25 as at 30 November 2003 and further interest of 8% per annum on the same amount from 1 December 2004 till date of realization.

(4) An order that an account be taken of the value of all works duly executed by the respondent and payment of any sum found due together with interest of 8% per annum thereon.

(5) Retention sum of RM1,446,980.23 together with interest at the rate of 8% per annum from such date to be determined by the court until full realization.

THE FIRST DEFENDANT

[8] Summary judgment for a sum of RM3,127,995.35 with interest thereon was obtained by the respondent against the first defendant on 8 January 2003. At the time of the trial, the first defendant did not appear. Thus when the trial proceeded, it was a contest between the respondent and the appellant.

APPELLANT'S DEFENCE

[9] In its defence, the appellant maintained that it had nothing to do with the respondent. It did not appoint the respondent as the contractor for phase 1 of the Project nor did the appellant make the representation as claimed by the respondent. Though admitting that it had made direct payments to the respondent on the three previous occasions as disclosed, the appellant explained that these were done for and on behalf of the first defendant who was experiencing cash flow problems at the material time and required loans from the appellant to tie them over this difficult period.

[10] As for the comfort letters, they were never sent to the respondent. They were only forwarded to the respondent's sub-contractors and suppliers. These were

intended to encourage them to lend support to the first defendant to complete phase 1 of the Project. According to the appellant, these letters were never intended to imply that the appellant would make payment direct to the respondent who would then disburse it to its sub-contractors and suppliers.

[11] With regards to the Supplementary Agreement, the appellant pointed out that the respondent is not privy to this contract. It is strictly an arrangement between the first defendant and the appellant. In any event, none of the terms stated in this Supplementary Agreement stipulates that the appellant has undertaken to pay the respondent for what is due and owing by the first defendant.

TRIAL JUDGE'S FINDINGS ON ISSUE OF LIABILITY

[12] At the conclusion of the trial, the trial judge made the following findings:

(1) The first defendant has failed to pay the respondent a sum of RM1,738,648.45 for Interim Certificates nos 20 to 24.

(2) The amount stated in Interim Certificates nos 24 to 25, as well as the respondent's progress claim no 26, is also due and ought to be paid by the appellant to the respondent.

(3) The notice of termination given by the first defendant to the respondent is mala fides, thus, unlawful.

(4) The representation as alleged by the respondent was indeed made by the appellant to the respondent. The reasons for this conclusion are listed as follow:

   (a) The Project was an abandoned project. There were 730 purchasers who were constantly complaining that their flats and houses are not completed on time. The appellant was instructed to complete them without further delay. The construction work was carried out by the respondent and Interim Certificates were issued by the architect. The amount claimed under these Interim Certificates was not paid by the first defendant and there was a danger that the respondent would stop work. This could have induced the appellant to make the representation to pay the respondent direct.

   (b) Clause 4(a)(ii) of the Supplementary Agreement also discloses that the appellant has expressly declared that it will be responsible to pay up to RM4m or any further sum owed by the first defendant so that the respondent's outstanding progress claims can be settled. This, being a contemporaneous document, supports the respondent's claim that the representation was made.

   (c) The appellant has also declared in the comfort letters that they are now the 'project owner'. The assumption of this status implies that the appellant has taken over the management of phase 1 of the Project and would be paying the claims of the respondent and its sub-contractors.

   (d) And finally the respondent in a letter to the appellant dated 17 January 2002 has reminded the appellant that 'it is because of your (appellant) direct involvement that had assured us and our suppliers to continually provide credit indulgence to your Project' that construction work in phase 1 of the Project continued.

(5) The appellant did not fraudulently make the representation to the respondent.

APPEAL AGAINST QUANTUM (APPEAL NO P–02–1030 OF 2004)

[13] Dissatisfied with these findings on liability, the appellant appealed. This is listed under Appeal No P–02–1030 of 2004.

ORDERS OF THE TRIAL JUDGE ON QUANTUM

[14] Subsequent to the finding on liability, the trial judge proceeded to decide on the quantum. After hearing, the following orders were handed down:

(1) The appellant to pay respondent RM5,433,913.49 in respect of Interim Certificates nos 20 to 25 and progress claim no 26.

(2) There shall be interest of 8% per annum on amounts stated in Interim Certificates nos 20 to 25 from the date when the writ was filed to the date of realization.

(3) Costs to the respondent.

APPEAL AGAINST LIABILITY (APPEAL NO P–02–1148 OF 2004)

[15] Dissatisfied with the above orders, the appellant filed notice of appeal. This is listed as Appeal No P–02–1148 of 2004.

CROSS-APPEAL (IN APPEAL NO P–02–1148 OF 2004)

[16] Since the trial judge did not order the return of the retention sum (retained by the first defendant at each stage of the progress payment) amounting to RM1,446,980.23, the respondent filed a cross appeal against the decision of the learned Judge after quantum was awarded. This cross appeal is registered under Appeal No P–02–1148 of 2004.

ANALYSIS ON THE ISSUE OF LIABILITY

[17] The main thrust of the appellant's appeal on liability lies in the dissatisfaction of the trial judge's finding that the representation was made to the respondent.

[18] Like all appeals of this nature, this court is once again forced to re-examine the evidence adduced during trial since the accusation is that the decision is against the weight of evidence. But before we undertake such task, we wish to reiterate that the approach of the Court of Appeal when faced with two conflicting versions where the issue is the credibility of witnesses about what was said or not said, or done or not done, as is the case here, is to give great weight to the view formed by the primary trier of fact and not to differ therefrom save in exceptional circumstances — Court of Appeal decision in *Hong Chuan Lay v Dr Eddie Soo Fook Mun* [2006] 2 MLJ 218.

[19] After perusing the evidence, we find that the trial judge has not only applied the right test as stated above, but has also supported his decision with cogent evidence. As disclosed, at the material time when the representation was allegedly

made, the appellant was well aware that a substantial sum was due and owing by the first defendant to the respondent and the first defendant had no means at the material time to satisfy this. Apart from this, the appellant also knew that if this was not paid, the respondent would stop work. The appellant, being the owner of the project, could not risk this since phase 1 of the Project had to be completed urgently in order to pacify the disgruntled house buyers. Under such pressing circumstances, and with a track record for bailing out the first defendant financially with direct payments to the respondent, we agree with the trial judge's finding that it is very probable that the appellant did make the representation to the respondent.

[20] This conclusion is further supported by the comfort letters and the Supplementary Agreement. On the comfort letters, Ms Ambiga, counsel for the appellant, attempted to persuade us that such letters, in law, do not amount to a contractual promise by the appellant to the respondent. To support this proposition, the case of *Kleinwort Benson Ltd v Malaysia Mining Corp Bhd* [1989] 1 All ER 785 was cited. Then she reminded us that these letters were never addressed to the respondent. They were only sent to the respondent's sub-contractors and suppliers. And finally, the contents do not expressly or, by implication, stipulate that the appellant will pay the debts of the first defendant.

[21] Though we are conscious of the fact that these comfort letters do not expressly declare that the appellant would be responsible for the debts incurred by the first defendant, but we think Ms Ambiga is mistaken as to the nature of influence these had on the trial judge. By themselves, these letters do not contain the representation nor do their contents bind the appellant to any contractual promise to pay the respondent for the outstanding debts. But by being contemporaneous documents, they infer that the representation was made by the appellant to the respondent. Such approach is not unconventional and not without authoritative support. Chang Min Tat FJ obiter in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, at p 234 said:

> For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[22] The other document which carries more weight is the Supplementary Agreement. Again this document should not be taken in isolation. We agree with Ms Ambiga that since the respondent is not a party in this agreement, the respondent is not privy to the terms and conditions therein. But this is not the issue. The focus on this document is that it contains provisions to pay the debts of the first defendant direct to the respondent. This is exactly what the respondent claimed that the appellant represented to them. When there exist such similar undertakings, especially made in a self declaratory statement in a formal document to a party who is very much involved in the matter, then it strongly implies that the representation was made.

[23] Then of course there is also, as the trial Judge found, the correspondence from the respondent to the appellant where the respondent complained that the appellant had not acted on its promise to pay. We agree once again that though this letter was sent after the appellant had refused to pay the respondent but, being a contemporaneous document, it strongly adds support to the existence of the representation.

[24] Having come to the conclusion that the representation was indeed made, the next question is whether the respondent was induced to act on it. As noted by the learned author GH Treitel in *The Law of Contract* (9th Ed) at p 328:

> A statement is likely to be a term of the contract where its importance is such that, if it had not been made, the representee would not have entered into the contract at air.

And elaborating on this, Lord Denning said in *Dick Bentley Productions Ltd & Anor v Harold Smith (Motors) Ltd* [1965] 2 All ER 67:

> Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on. But the maker of the representation can rebut this inference if he can show that it really was an innocent misrepresentation, in that he was in fact innocent of fault in making it, and that it would not be reasonable in the circumstances for him to be bound by it.

[25] Here in our instant case, there is no dispute that after the representation was made, the respondent acted on the inducement contained in the representation by firstly, not terminating the Building Agreement, which it could have done, and secondly, by continuing with further construction on phase 1. It is our view that the respondent would not have forgone and undertaken these acts if not for the representation made by the appellant.

CONCLUSION ON LIABILITY

[26] Therefore on the question of liability, we are of the view that the learned trial judge has not erred in finding for the respondent.

APPEAL ON QUANTUM

[27] On the appeal over quantum awarded, the appellant is basically dissatisfied with the trial judge's:

(a) refusal to allow the appellant to cross-examine the architect who issued the Interim Certificates nos 20 to 25, thereby depriving the appellant of an opportunity to challenge the works of the respondent stated therein;

(b) failure to set off an amount for building materials removed from the site before the first defendant regained possession of it; and

(c) award of pre-judgment interest to the respondent.

REFUSAL TO ALLOW CROSS-EXAMINATION OF THE ARCHITECT

[28] On the first assertion of the appellant, Ms Ambiga has relied on a passage from the authoritative text of *Hudson's Building and Engineering Contracts* (10th Ed) at p 492, which says that interim certificates 'in the absence of express provision, are not conclusive or binding on the employer as an expression of satisfaction with the quality of the work or materials' supplied. Furthermore, at p 497 of the same text it says that these interim certificates do not 'bind strangers to the contract unless they have themselves contracted to be bound by them, or are claiming in some way through a party to the contract.'

[29] The Interim Certificates were issued by the Project architect after progress payment claims were submitted by the respondent to the first defendant. Before these certificates were issued, the architect must have verified the respondent's claim. Despite this, the appellant now wishes to question the architect on the works mentioned in these documents. We agree with the trial Judge that this should be refused. The reason is simple. The defence did not plead that the quality of work and materials supplied as mentioned in Interim Certificates were unsatisfactory. Though the authoritative text is correct in stating that whilst an interim certificate is not conclusive and binding on the employer as an expression of satisfaction with the quality of work and materials supplied nevertheless, if the employer desires to challenge this, then it is imperative for him to say so in his defence, otherwise he is deemed to have conceded to the quality and materials stated therein. We are of the further view that not only must this be pleaded, the employer must also advance reasonable amount of particulars, in detail, as to why the amount stated in such document is disputed and ought not be paid. This requirement is derived from the Supreme Court decision in *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57, where the court held that before the employer can dispute such interim certificate, the employer must advance cogent evidence, with reasonable amount of detail, as to why the amount listed in such architect's interim certificate should not become due before unconditional leave to defend is allowed. To support this proposition, the Supreme Court quoted a passage from *Building Contracts* (4th Ed) by Donald Keating which declares:

> Every case turns upon its facts but excellent evidence is either an admission by the defendant, or his authorized agent, or a certificate by the defendant's architect or engineer, which is a special and formal kind of admission. When evidence of this nature is established the court usually requires cogent evidence from the defendant before it grants leave to defend. Thus merely to allege the existence of defects in the works, or a claim for damages for delay without in each case giving some reasonable amount of detail and of quantification is unlikely to result in leave to defend.

[30] As the appellant has failed to plead this issue in its defence, let alone providing particulars, then this ground of appeal cannot be sustained.

FAILURE TO SET-OFF THE COST OF BUILDING MATERIALS MISSING FROM THE SITE

[31] Though building materials were found missing from the building site after the first defendant repossessed it from the respondent, but what is the value of such

missing materials? To succeed in a claim for such items, it is only elementary that one must first identify the missing items and then prove their worth. Here, there is a total absence of the latter. For this, we uphold the trial Judge's ruling in not awarding any sum to the appellant under this item to set-off against the amount due to the respondent.

PRE-JUDGMENT INTEREST

[32] The appellant's last ground of appeal relates to the award of pre-judgment interest by the High Court. It is formulated in this manner:

(1) In the respondent's statement of claim, the respondent has made the following claim for interest:

> As against the defendants, an order for payment of a sum of RM1,556,198.12 being interest at the rate of 8% per annum on the sum of RM3,970,936.44 due on Architect interim certificates Nos 20, 21, 22, 23, 24 & 25 as at 30 November 2003 and such further interest at the rate of 8% (per cent) per annum on the said sum of RM3,970,936.44 due from 1 December 2004 till date of full realization.

(2) According to the appellant, the High Court has awarded 'pre-judgment interest from the date of the Supplemental Agreement, namely 2 January 2001 when the Building Contract did not provide for any late payment interest'. The learned judge has therefore 'erred in law and/or in fact in finding in effect that the date of the purported representation by the appellant to the respondent was the date of the Supplemental Agreement' when the respondent is not a party to this contract.

[33] This contention caused us to check the court order given in respect of quantum for this case. To our surprise, no seal copy of this order is annexed to the Appeal Record in respect of this appeal. Only a draft order is attached. And even on this draft order there are numerous amendments with crossing-outs and handwritten remarks over the portion associated with pre-judgment interest. This draft order has obviously not received the sanction of the Registrar of the High Court since we noticed that no officer of the High Court has signed thereon and affixed the common seal of the court thereon.

[34] We then proceeded to peruse the grounds of judgment of the trial judge concerning this issue. We found this recorded:

> Tuntutan faedah ke atas amaun Sijil Akitek No 20–25 dari tarikh matang ditolak/tidak dibenarkan. Faedah 8% dibenarkan dari tarikh pemfailan tindakan Mahkamah.

[35] Against this background, we are of the view that this contention of the appellant cannot be entertained for reason of uncertainty. There is, before us, no sealed copy of the court order made in respect of pre-judgment interest. And what

is alleged by the appellant is not even an item allowed by the trial judge in his grounds of judgment. When there is no definite award made on this matter, then no issue can arise out of it.

CONCLUSION

[36] For reasons aforesaid, we dismissed the appellant's appeal in respect of quantum in P–02–1148 of 2004.

CROSS-APPEAL

[37] The cross-appeal of the respondent relates to the retention sum set aside in each progress payment. It is based on a percentage of the amount claimed. Such sum is intended to indemnify the first defendant and/or the appellant for any cost involved in making good any defect discovered after the buildings in Phase 1 are completed. If such defect is not rectified then the first defendant and/or the appellant would deduct from this retention sum the cost to make good such defect. If there is any balance left, it would be returned to the respondent. And if there is no defect detected during the defective period, the entire sum so retained should to be handed back to the respondent. In short, the respondent received or will receive less than what he ought to be paid for the work and materials supplied under its progress claims. Now, the respondent demands the return of such sum retained or to be deducted. So, should the respondent be paid such sum?

[38] The circumstances of this case are somewhat different from the norm. The buildings were uncompleted when the Building Agreement was terminated. The construction had come to an abrupt end. In such situation, we are of the view that these questions are required to be answered in order to arrive at a decision on whether the respondent is entitled to the refund of the retention sum: (a) whether there was any defect to the buildings so constructed; (b) if there was, whether request was made by the first defendant and/or the appellant to the respondent to make good such defect; (c) if there was, whether the respondent had refused to remedy such defect; (d) if the respondent had refused, whether the first defendant and/or the appellant had carried out such remedial work themselves and deducted the cost incurred from the retention sum?

[39] From the evidence adduced, we found that the appellant's witnesses have claimed that certain items in the buildings were missing or damaged. This was when they attempted to retake possession of the building site. But we found no request by either the first defendant and/or the appellant to the respondent to make good these missing or damaged items. And neither was there any evidence to quantify the amount spend in replacing and repairing them. In the absence of these, it must be implied that the first defendant and/or the appellant had agreed to forgo such claim to be paid out of the retention sum. For this, we are of the view that the retention sum must be refunded to the respondent. But should the appellant be made to refund the entire sum which is an accumulation of retention sums since progress claim no 1? We do not think so. Since the representation is confined to principally payment of Interim Certificates nos 20–25 and progress claim no 26, then it is our view that

any refund of the retention sum by the appellant must be restricted to the amount retained under these certificates and claim.

CONCLUSION

[40] For reasons stated, we would only allow this cross-appeal in part. Theappellant should refund to the respondent the amount retained under Interim Certificates nos 20–25 and progress claim no 26.

ORDERS

[41] Accordingly, we made the following orders:

(a) Appellant's appeal in P–02–1030 of 2004 is dismissed with costs. Deposit for this appeal to the respondent towards account of taxed costs;

(b) Appellant's appeal in P–02–1148 of 2004 is dismissed with costs;

(c) Respondent's cross appeal in P–02–1148 of 2004 is allowed in part. The appellant should refund to the respondent the amount retained under Interim Certificates nos 20–25 and progress claim no 26. Costs to the respondent for this cross appeal.

Appeal dismissed and cross appeal allowed in part.

Reported by Loo Lai Mee